(2)

No. 06-546

Supreme Court, U.S.
FILED
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In the
SUPREME COURT OF THE UNITED STATES

TOM JENSEN, Individually and as an advocate
for the rights and interests of his mother, Marguerite Jensen (now deceased), a frail elderly institutionalized person,

Petitioner

v.

SWEET HOME ONE CARE FACILITY
A business entity, et al.

On Petition for Rehearing of Denial of Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Tom Jensen
P.O. Box 614
Oakland, CA. 94604

Petitioner in propria persona

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QUESTIONS PRESENTED

I. Was Petitioner denied his due process right to a hearing on his claims before an impartial tribunal by the district judge ?

II. Do the proceedings in this case lack the appearance of fairness ?

III. Does this court have the jurisdiction or discretion and duty to hear the foregoing matters ?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner/Plaintiff

Tom Jensen.

Defendants

Sweet Home One Care Facility, a business entity; Minerva Mostrales, Soledad Almocera ("Sweet Home defendants").

California Health and Welfare Agency (currently known as the California Health and Human Services Agency), California Department of Social Services, Community Care Licensing Div., public entities; Elaine Arrington, Anita Gopaul, Martha Lopez ("State defendants").

Kaiser Permanente Medical Offices – Milpitas (a.k.a. Kaiser Permanente Medical Group, Inc., Kaiser Foundation Health Plan, Kaiser Foundation Hospitals) business entities; Bill Jue MD ("Kaiser defendants").

Peter Jensen, Beth Wells ("Jensen/Wells").

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Tom Jensen, for himself and as an advocate for the rights and interests of his mother Marguerite Jensen, a frail elderly institutionalized person (now deceased), respectfully petitions for a rehearing of the denial of his petition for writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The May 18, 2006 decision of the U.S. Court of Appeals is reproduced at App.1 of petitioner's Petition for Writ of Certiorari. The January 31, 2005 decision of the U.S. District Court for the Northern District of California granting defendants' summary judgment motions is reproduced at App.7 of the Writ.

JURISDICTION

This Court has jurisdiction for rehearing a petition for writ of certiorari pursuant to Supreme Court Rule 44.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at App.v

STATEMENT OF THE CASE

Statement of the Facts Material to Consideration of the Questions Presented

1. In petitioner's proposed 3rd amended complaint against Jensen/Wells he alleged, inter alia, that "state defendants acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against Plaintiff which were made to them by Sweet Home and Family defendants, (Jensen/Wells) and which were meant to discredit and defame him and to discredit his reports of the neglect of his mother." App.1. In their 7/10/03 motion to deny of leave to amend,

Jensen/Wells asserted that "[t]he gist of Plaintiff's allegations against the Family defendants is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct that they believed to be detrimental" to petitioner's mother. App.2. The Judge in his 7/31/03 order denying leave to amend stated, inter alia, that "the attached exhibits, if taken as true, acknowledges that [Jensen/Wells] merely expressed their views to state officials in the hopes that they would agree." App.3.

2. On 9/23/03 Petitioner filed a motion for reconsideration of the court's order denying leave to amend stating, inter alia, that the judge had "wholly ignored the factual allegation of the complaint that alleged facts and evidence of [Jensen/Wells'] improper motives of retaliation and discrimination on the basis of disability and plaintiff's arguments setting out these things." App.4-5. In its 1/5/04 order denying reconsideration, the court threatened Petitioner with sanctions for raising the issue and the lack of impartiality it implied. App.6-7. App.5, note 6.

3. On 3/9/04, and after extensive meet and confer with Kaiser defendants, petitioner filed a motion to strike Kaiser defendants answer for, inter alia, failure to do a reasonable inquiry before answering and failing to admit facts in their possession, App.8-9 (excerpts from motion), and on 3/26/04, a motion for discovery sanctions for, inter alia, Kaiser's persistent violations of the discovery rules and the court's case management order, inter alia, App.10-12. On 4/12/04 Kaiser defendants sent a letter to the judge claiming that petitioner's motion for sanctions was "in essence a discovery motion," and stating that "Kaiser defendants are ready to oppose the motion on its merit, unless otherwise directed by the court." App.13-14. On [ ] the judge "terminated" petitioner's two pending motions without full briefing or a hearing on the merits of the motions, and without notice or hearing to petitioner regarding the judge's decision to "terminate" them. App.15-16.

4. After the judge had failed to respond to petitioner's Standing Order 2 letters for discovery relief prescribed by the judge's 4/27 Order, petitioner filed a letter-motion on 9/19/04 moving for a stay for reason that the judge had exhibited a lack of impartiality, and had violated petitioner's due process and procedural rights during the course of the proceedings and had prejudiced him and left him unprepared for summary judgment in spite of his diligent efforts in pursuit of discovery. App.17-18. The court did not respond to this letter-motion.

5. In its summary judgment order the judge stated as an undisputed fact in support of its disposition that the visitation restrictions were based in part on Jensen/Wells "genuine concern" for Petitioner's mother. App.19 (Order at 33). While ignoring petitioner's pleadings and direct evidence and the justifiable inferences supporting them that their concern was *not* genuine,). e.g. App.21-22 (e-mail of Jensen/Wells'), on the basis that it was purported hearsay, App.20 (Order at 34, the judge in contrast, cited defendants' hearsay concerning petitioner's purported conduct and treated it as true in support of its disposition. App.20 (order). App.23 (Mostrales' letter). App.20 (order). The judge also wholly failed to consider any of petitioner's pleaded facts of the neglect of his mother's personal and health care, App.24-28 (SAC ¶¶ 14-22 and declaration ¶ 8 verifying the facts), or any of the evidence supporting them as evidence showing that Jensen/Wells "genuine concern" and Mostrales' hearsay allegations of petitioner's "behavioral problems" were pretexts for retaliation or discrimination.

6. In the first paragraph of his summary judgment order, the judge made a comment involving the length of the proceedings and the volume of the filings. App.29. The "intermediate appeal" was based on the failure of the first judge's failure to treat the factual allegations of the complaint as true and draw all reasonable inferences in petitioners favor which the defendants improperly influenced her to make. App.30 (Order). App.31 (petitioner's motion before

dismissal). After remand the defendants proposed to strike ("redact"), inter alia, petitioner's verified allegations of the neglect of his mother's personal and health care without briefing. App.32. After reassignment, all the defendants failed to properly respond to petitioner's requests for documents and information and engaged in persistent violations of the federal rules and continued misrepresenting petitioner's pleadings in their motions. This conduct required petitioner to respond and distracted him from preparation for trial.

In the last paragraph of his order the judge stated his opinion that the "heart" of the lawsuit was petitioner's despondency over the state of the relationship with his family, and that his motivation for bringing the suit was "vengeance." App.33-34. The judge's opinion is not consistent with petitioner's declaration verifying the neglect of his mother's personal and health care he alleged, nor is it consistent with his declaration verifying his concern for and sense of duty to his mother. App.35 (declaration at ¶14)

7. Petitioner raised the issue of the unfair conduct of the proceedings in the court of appeals in his proposed oversize brief, and in a request for judicial notice, App.36 (excerpt from brief and req. for jud. not.), and mentioned the prejudice accruing to him in his appellant's brief, App.37 (excerpt from brief), when leave to file the proposed oversized brief was denied.

ARGUMENT

Legal Standards: Due process requires an impartial decision maker. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). *In Re Murchison*, 349 U.S. 133, 136 (1954). federal law and judicial canons of ethics require that federal court proceedings have the appearance of fairness and that the judge "be faithful to the law." 28 USC § 455(a). Canons 2(A) and 3(B)(2). App.pg.1. Judicial "expressions" during a proceeding may well be based on extrajudicial knowledge or motives, and evidence of lack of impartiality may arise from the

proceedings themselves by "*wrongful*" or "*inappropriate*" comments or opinions and dispositions of a judge during the course of the proceedings that were undeserved. Opinions formed by a judge during a proceeding that evidence "deep-seated favoritism or antagonism that would make fair judgment impossible" are grounds for disqualification or reversal. *Litekey v. United States*, 510 U.S. 540, 545, 550-52, 555 (1994) (emphasis in original). Section 455 (a) and (b)(1) imposes on a judge the duty to recuse himself sua sponte whenever "his impartiality might reasonably be questioned," or when he has a personal bias or prejudice concerning a party.

Summary of Argument: Lack of impartiality by the judge in this case is evidenced by the Judge's dispositions and judicial expressions about petitioner during the course of the proceedings that were wrongful and inappropriate because they were undeserved and demonstrated a lack of impartiality and failure to be faithful to the law pursuant to a predisposition favoring opposing parties. This court has the jurisdiction and discretion to hear the issue of the district court judge's lack of impartiality, because petitioner raised the issue in the district court before the judge's summary judgment decision and the judge failed to respond to it, and raised the issue in the court of appeals and that court failed to respond to it. This court also has the inherent and supervisory powers and duty to review the issue sua sponte.

1. The district court judge's comments in its order dismissing petitioner's claims against Jensen/Wells shows that he failed to properly consider petitioner's pleadings, and demonstrated his partiality to opposing parties' version of the facts expressed in their motions, and a closed mind to the pleadings. See citations to Appendix at Statement of Facts Material to the Questions Presented ("Facts") at 1 supra.

Jensen/Wells' motion misrepresented the pleadings, and the judge's comments in its order indicated that he had adopted those misrepresentations, and petitioner's factual allegations of his complaint that alleged and provided direct and circumstantial evidence of the improper motives of Jensen/Wells and other defendants of retaliation and disability discrimination in the

form of detailed factual allegations of the neglect of his mother's personal and health care, the close proximity of time between Petitioner's reports of that neglect and the adverse actions taken against him by Jensen/Wells, and statements by Jensen/Wells and other defendants that Petitioner was "mentally unstable" and "mentally ill." No reasonable judge could have possibly or properly treated Jensen/Wells' misrepresentation of the pleadings as true, nor considered Jensen/Wells' motives as pure if Petitioner's allegations of the neglect of his mother's personal and health were properly treated as true.

The circumstances show that the judge failed to be faithful to the law requiring him to consider the issues raised by the pleadings and treat the pleadings as true and draw all reasonable inferences in the pleader's favor. The judge's failure to be faithful to the law properly would cause any reasonable person with a knowledge of all the facts and circumstances to have reasonable cause to question the judge's impartiality. 28 USC § 455(a). Moreover, the judge's disposition was a wrongful and inappropriate "backdoor" judgment on petitioner's essential pleaded issue of retaliatory motive and intent that was undeserved. *Liteky*, supra at 550.

2. The judge improperly and undeservedly threatened petitioner with sanctions shortly in his order responding to petitioner's motion requesting reconsideration of the judge's failure to consider the pleaded facts, evidence, and proper inferences of Jensen/Wells' improper motive and intent. See Facts at 2 supra.

The judge's order denying Petitioner's motion for reconsideration wholly ignored Petitioner's specific request that the court reconsider its failure to consider Petitioner's factual allegations and the evidence supporting them that Jensen/Wells and the other defendants acted with retaliatory or discriminatory motive and intent. It was unreasonable for the judge to fail to reconsider the matter, and if he had, he would have had to admit that these facts were the elements of joint action that he considered to be missing. Instead of stating that "plaintiff's siblings merely expressed their views to state officials, in the hopes that they would agree," the

judge would have had to state that "plaintiff's siblings expressed their retaliatory and discriminatory allegations against plaintiff to state defendants, and state defendants corruptly agreed with them."

The judge's threat of sanctions was wrongful and inappropriate because it improperly threatened Petitioner for expressing his procedural and due process rights. The judge's threat of sanctions would cause any litigant to become "overawed, frightened and confused" by the judge's failure to follow the law and making intimidating threats when his failure to do so was pointed out. *Gardiner v. A.H. Robbins Co., Inc.*, 747 F.2d 1180, 1193 (8th Cir. 1984).

3. The judge effectively, and improperly and undeservedly carried out his sanction threat shortly after issuing his threatening order, by his improper ad hoc "termination" of petitioner's motions for relief from Kaiser defendants' abusive litigation tactics, and by improperly ignoring Petitioner's subsequent requests for discovery relief pursuant to his order. See Facts at 3 supra.

Under the federal rules and due process principles, petitioner was entitled but did not receive a hearing on the merits of his motions, nor was he given an opportunity to be heard on the merits of his Standing Order 2 letters for discovery relief. Moreover, his due process rights to notice and a hearing before the termination of his motions, and denial of his right to be heard on his request for discovery relief were violated. *Gardiner* supra at 1190-92 (due process required before depriving litigant of constitutional, or procedural right). *Id.* at 1193 (due process required before imposing sanctions).

Moreover, there is no evidence that the motions and letters requesting discovery relief were not justified, instead there is ample evidence that they were, and the judge decided the issue of the termination of his motions on the basis of a conclusionary misrepresentation of petioner's motions and the circumstances giving rise to it by Kaiser defendants. The judge by terminating Petitioner's motions, and failing to respond to Petitioner's letters requesting discovery relief

effectively ratified the Kaiser defendants' improper conduct and effectively served notice to Kaiser and to the other defendants that they could do so as well. Petitioner was thereby denied his rights to discovery of relevant and unprivileged information, denied his procedural and due process rights, and deprived of the judge's reasons for the denials for purposes of appeal and review. *Gardiner* at 1193.

By his dispositions, the judge demonstrated that he would hear only the evidence that Kaiser defendants were willing to provide as part of their defense in their motion for summary judgment, regardless of petitioner's rights to discovery of relevant evidence to prove his claims, and petitioner's right to have the court receive and consider it, as well as the court's duty to do so. FRCP 1. Canons 2(A), 3B(2) and 3B(7). *Goldberger v. Goldberger*, 624 A.2d 1328, 1332 (Md.App. 1993) (in motion for recusal trial court's statement indicating that no witnesses would be heard other than parties was held to be particularly injudicious because "[t]he trial court's function is to hear witnesses"). *In Re Eastmoore*, 504 So.2d 756, 757-58 (Fla. 1987) (The public can have little confidence in the impartiality of a decision when the litigant is cut short in the presentation of her case and the decision maker's demeanor bears all the indica of prejudice and a closed mind") (citing Canon 3).

The judges disposition on these matters was wrongful and inappropriate because the denial of Petitioner's rights was not deserved, prejudiced Petitioner, and was contrary to the law. The termination was effectively a sanction for Petitioner's assertion of his rights to fair procedures for which Petitioner did not receive the process due. The judge's dispositions, therefore, exhibit a pervasive bias and prejudice that constitute a denial of the right to an impartial tribunal. *Liteky* supra at 545, 550. *Gardiner* at 1191-93.

4. Petitioner's letter-motion filed in response to the judge's termination of Petitioner's motions and for the judge's failure to respond to his Standing Order 2 letters

seeking discovery relief was effectively a motion for recusal for the judge's lack of impartiality, to which the judge should have but did not respond either by recusing himself sua sponte or by hearing the motion. See Facts at 1, 2, and 3 supra.

Petitioner's letter-motion was labeled as a motion to stay, but the reason for the request for a stay was the judge's violation of petitioner's constitutional and procedural rights, arising from the judge's evident lack of impartiality. The judge's failure to respond to the motion was itself a violation of petitioner's due process and procedural rights, and was an undeserved disposition that demonstrated such a pervasive bias and prejudice as to deprive petitioner a hearing before and impartial judge. Canon 3(b)(7). *Liteky* supra at 545, 550. Moreover, the judge's failure to respond effectively prevented meaningful review of the issues raised by Petitioner's motion on appeal, and the effects of the judges bias had become so pervasive as to prejudice any review of the merits of the case.

On the basis of the judge's failure to respond when the issue of the judge's lack of impartiality was raised by petitioner before summary judgment, this court has the discretion and duty to consider this issue. *Gardiner* at 1190-91.

5. The judge improperly carried forward its improper predisposition on Jensen/Wells' motive and intent into its summary judgment disposition. See Facts at 1, 2, and 4 supra.

The judge's statements in its order denying leave to amend as to Jensen/Wells showed that it had unlawfully and prematurely decided the issue of who to believe and the merits of the case in regard to opposing parties' motive and intent and the neglect of petitioner's mother before any evidence was presented, and as if to prove its predisposition injudiciously ignored the evidence clearly contrary to its predisposition when it was properly presented by petitioner on summary judgment.

The judge ignored multiple statements by defendants and Jensen/Wells, including

admissions by Jensen/Wells and defendants that indicated that their conduct was motivated by disability discrimination or by retaliation against petitioner in response to his reports of the neglect of his mother. In order to justify ignoring this material evidence the judge injudiciously failed to follow the law by calling it "inadmissible hearsay," even though the defendants' and Jensen/Wells own contemporaneous statements evidencing their state of mind were involved, and even if they were hearsay are specific hearsay exceptions. These are rules of evidence petitioner had every right to rely on for evidence in support of his claims, and which denial in this case rises to a constitutional violation. Moreover, the judge unevenly applied its disposition on hearsay and demonstrated its lack of impartiality by citing hearsay of defendant Mostrales in support of its disposition against petitioner.

Since the judge's evidentiary disposition involved evidence contrary to what the judge had previously wrongfully and prematurely decided, it evidences that the judge deliberately violated the law pursuant to his predisposition favoring opposing parties. FRCP 1. Canons 2A and 3B(2). *Gardiner* supra at 1192 ("When a judge passes judgment on parties before him without hearing all of the evidence and without a trial, we deem such comments highly injudicious"). *Id.* at 1193. *In Re Eastmoore* supra.

The judge also carried over its predisposition involving petitioner's pleadings of defendants retaliation and discrimination against him in response to his reports of the neglect of his mother by wholly ignoring Petitioner's allegations of the complaint including Petitioner's detailed allegations of the neglect of his mother's personal and health care, Petitioner's declarations including his declarations verifying the facts of the complaint, *and* Petitioner's considerable documentary evidence of the neglect of his mother's personal and health care that was the issue central to all his claims against all parties.

The fact that the judge ignored Petitioner's pleadings and the evidence supporting them was highly injudicious, appeared to and had the effect of a sua sponte motion to strike the allegations without a hearing, and clearly indicated the judge's lack of impartiality. Canons 2A and 3B(2). *Liteky*, *Gardiner*, *Goldberger*, *In Re Eastmore* supra.

6. The judge's lack of impartiality is evidenced by the judge's comments obliquely charging Petitioner with the fault for the length of the proceedings and the volume of the filings, and stating that the "heart" of the case was petitioner's despondency over the state of his relationship with his family and that his motivation for bringing this action was vengeance. See Facts at 6 supra.

In his opening paragraph of his summary judgment the judge stated that "[a]fter four years of contentious litigation, an intermediate appeal to the Ninth Circuit and a literal mountain of filed documents (occupying eleven large folders), this case has finally reached its final summary judgment stage." Considering the judge's actions set out above, along with the rest of the judge's order and the judge's "opinion" set out below, there is no doubt that this statement was intended to infer that the circumstances of the proceedings and the volume of the files were somehow petitioner's fault. This statement was undeserved and prejudiced Petitioner, because the real cause of the delay and the "mountain" of documents clearly lies elsewhere. The judge misrepresented by omission the fact that the "intermediate appeal" was reversed and remanded on the basis that the first judge in the case failed to treat the factual allegations of the complaint as true, a fact that involved a considerable and oppressive burden to Petitioner and which was not his fault.[1] Instead, fault for a considerable portion of the volume of the filed documents, therefore, rested squarely in the hands of the first judge and the opposing parties who had

[1] In writing his first appellant's brief, petitioner repeatedly and up to the last minute worked himself to exhaustion pondering the judge's reasoning without comprehending until it occurred to him as an epiphany that the judge had failed to treat the factual allegations of the complaint as true. It was an epiphany because, up to that point, Petitioner had a faith in the law and the fairness of the judicial system that had to be broken to recognize the judge's failure to follow the law.

influenced her to make a wrongful decision.

The judge's statement also disingenuously misrepresented his lack of fair and impartial management of the case that was a significant determinate of the volume of the filings. By failing to hear and decide the issues in dispute at the case management conference the judge ratified the abuses that already had occurred and gave its tacit approval for their continuation. Under the circumstances, Petitioner was obligated to file documents seeking relief and devote much space in his filings in fruitless protest about the oppressive and self-serving misrepresentations by opposing parties of the pleaded facts, and in seeking relief from discovery abuse that are merely illustrated above. Petitioner's own un-filed papers consist of a large volume of documents directed at fruitless efforts to meet and confer. Much of the volume of the filed documents derived from defendants' oppressive conduct and the fault for it lies with them and the judge, not with petitioner.

The judge's opening paragraph statement is therefore undeserved and disrespectful of the oppressive and sometimes extreme difficulties of five years of litigation by a person with significant health problems who began the litigation with no schooling in the law and naïve faith in the legal system, and who faced and suffered significantly from abusive litigation practices while the judge refused to hear or act on Petitioner requests for relief when he brought it to the judge's attention. The judge's comment was wrongful and inappropriate because it failed to arise from the judge's fair consideration of both sides of disputed issues. In such a context, the judge's statement was an undeserved innuendo that exhibited the judge's pervasive bias and prejudice, and prejudiced Petitioner in the reviewing courts. *Gardiner* supra at 1192, *Liteky* supra at 545.

In the closing paragraph of his summary judgment decision the judge stated his "opinion" as follows:

> On a side note, after four years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these differences are eventually healed or, at least ameliorated. But its is not the job of the court to provide vengeance or leverage to siblings involved in family disputes. The court believes that efforts to repair his tattered relationships will yield Jensen more promising results than litigation.

This statement of opinion is undeserved, prejudicial to petitioner, and incredibly disrespectful of the law and of Petitioner's sense of duty to his mother, and the personal sacrifices Petitioner had to make to come to her aid. The judge's opinion is necessarily based on failing to follow the law of the legal standards of review on summary judgment. The judge unlawfully failed to consider the pleaded issue of the neglect of his mother's personal and health care as Petitioner's motivation for his coming to his mother's aid as well as Petitioner's declarations and other evidence to that effect, and unlawfully drew an unsupported and unsupportable inference favorable to opposing parties. Moreover, no party provided evidence or alleged that Petitioner was despondent over his relationship with his siblings, or that he was motivated by vengeance, nor could they. [2]

The Judge's opinion was wrongful and inappropriate because it was undeserved, and because it was arrived at in violation of the law and indicated the judge's willingness to violate the summary judgment standards of review in deriving his opinions. In the context of a summary judgment motion and as the non-moving party, Petitioner's integrity, and good faith in bringing the suit should not be an issue considered by the judge, or if it is it should be assumed. The fact

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[2] Petitioner's decision to file a federal lawsuit was based on his research showing that their was no effective state oversight or remedy for institutional neglect of the elderly because "supposedly competent institutions designed to protect and vindicate the rights of [the institutionalized elderly] have consistently failed to do so." App.38 (¶ 85 of all versions of complaint). After making the decision, petitioner literally asked himself "why me" at the burden the decision imposed. Indeed, why ? The original complaint included a request for injunctive relief for his mother. App.39 (FAC ¶ 111(a)). Petitioner rushed to file the complaint because he feared that his mother would die as a consequence of the neglect of her health care. Any reasonable person would agree that is what occurred.

that it wasn't indicates that the judge's opinion of Petitioner was a wrongful and inappropriate factor in the judge's decision making and revealed the judge's personal bias and prejudice and a high degree of antagonism toward Petitioner such as to make a fair judgment impossible. *Liteky* at 550, 555. Moreover, the judge's opinion amounted to a gratuitous and undeserved personal attack on Petitioner's good name, reputation, honor, integrity and good faith that the judge had no right or lawful judicial reason to make, and for which Petitioner was denied due process. *Gardiner* supra. In such a context the judge's opinion exhibited a pervasive bias and prejudice. *Id.*

7. This court has jurisdiction to hear the lack of impartiality issue because the issue was raised but not heard in the district court and in the court of appeals. See Facts at 4 and 7 supra.

Petitioner raised the issues of the judge's comments and dispositions that indicated the judge's lack of impartiality in his proposed oversize brief, in his request for judicial notice of the sections of the oversize brief that dealt with those issues, in his appellant's brief, and in his motion for rehearing. The court of appeals, however refused to consider it. On the basis that the issue was effectively raised but not heard in the lower courts, this court has discretion and duty to hear the issue of the lack of impartiality and pervasive bias and prejudice in the district court. This court also as the discretion and duty to hear the issue sua sponte. *Gardiner* supra at 1190-91.

CONCLUSION

The totality of the circumstances and the examination of the words and actions of the district judge as a whole show that he had a "deep-seated favoritism or antagonism" against Petitioner "that would make fair judgment impossible." Moreover, the judge's failure to hear and act on Petitioner's letter-motion raising the issue of his lack of impartiality, and the judge's

comments involving innuendo and opinion about Petitioner that were undeserved are by themselves sufficient wrongful and inappropriate conduct to show for that Petitioner was denied his 14th Amendment rights to an impartial tribunal. Moreover, the conduct of the proceedings in this case cannot stand up to public scrutiny. Any reasonable person with a knowledge of the facts would believe that the proceedings were fundamentally unfair to Petitioner.

The decision of the district court on the merits of Petitioner's claims also cannot stand up to public scrutiny. Any reasonable person, and any reasonable judge would consider that the district judge's failure to hear Petitioner's allegations and considerable evidence of the neglect of his mother's personal and health care and of the defendants' retaliatory and discriminatory motive and intent was unfair and unreasonable. If this evidence is actually considered, any reasonable person and any reasonable judge would believe that the case was wrongfully decided.

The dispositions of the federal courts in this case bring the fairness of the federal judiciary into serious question. This court cannot have the discretion to fail to hear and act on this case.

REQUEST FOR RELIEF

This court should rehear this case and issue a summary order vacating the judgment on the basis that the proceedings in the district court were unfair in fact, and that the proceedings in this case have the appearance of unfairness.

Respectfully submitted by, Tom Jensen,
Petitioner in propria persona
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Oakland, CA 94604

INDEX TO APPENDIX

Opinions and Orders:

The full text of the Opinions and Orders and Second Amended Complaint are set out in the petition for writ of certiorari.

Federal Statutory Provisions:

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Federal Rules of Civil Procedure:

Rule 1 ..... App.iv

Model Rules of Judicial Conduct of the American Bar Association:

Canon 2(a) ..... App.iv

Canon 3(b)(2) ..... App.iv

Canon 3(b)(7) ..... App.v

Other Relevant Materials:

Pg.27, ¶¶ 89 and 90 of (proposed) 3rd amended complaint (received 6/11/03) App.1

Pg.7 of Jensen/Wells 7/10/03 opposition to petitioner's motion to file 3rd amended complaint (ER 195, Doc.No.242) App.2

Pg.18 (denying leave to file 3rd amended), of Judge Walker's 7/29/03 order complaint (ER 196, Doc.No.248) App.3

Pgs.7-8 of Petitioner's 9/23/03 motion for reconsideration (Doc.No.253) App.4-5

Pgs.3-4 (threatening sanctions) of Judge Walker's 1/5/04 Order (Doc.No.278) .. App.6-7

Pgs.5-6 of Petitioner's 3/9/04 motion to strike Kaiser's answer (Doc.No.295) ... App. 8-9

Pgs.5-7 of Petitioner's 3/26/04 motion for discovery sanctions against Kaiser (Doc.No.302) App.10-12

Kaiser's 4/12/04 letter to Judge Walker (concerning petitioner's pending Motions) (Doc.No.304) App.13-14

Judge Walker's 4/27/04 Order "terminating" petitioner's motions (Doc.No.307)..... App.15-16

Petitioner's 9/14/04 letter-motion raising the issue of Judge Walker's lack of impartiality and requesting a stay to settle pending discovery disputes (Doc.No.321) App.17-18

Pgs.33-34 of Judge Walker's 1/31/05 summary judgment (Doc.No.389) App.19-20

Jensen/Wells' 6/7/99 e-mail message stating state of mind concerning Petitioner and his reports of the neglect of his mother's care (ER 71) App.21-22

Exhibit C, pg.3 of the Second Amended Complaint (defendant Mostrales' statement concerning petitioner) (Doc.No.311) App.23

Pgs.5-7, ¶¶ 14-22 of the Second Amended Complaint (petitioner's factual allegations of the neglect of his mother's personal and health care) (Doc.No.311) App.24-26

Petitioner's 9/7/04 declaration verifying ¶¶ 11-74 of the Second Amended Complaint (¶ 14) (ER 183-184, Doc.No.343) App.27-28

Pg.1 of Judge Walker's summary judgment order (statement concerning the length of the proceedings and the volume of the files) (Doc.No.389) App.29

Pg.2 of the Memorandum decision of the court of appeals filed in the district court on 7/1/02 (ER 1, Doc.No.136) App.30

Petitioner's Second Reply to Motions to Dismiss in Judge Illston's court (Doc.No.58) App.31

Pg.10 of the transcript of the case management conference in the Illston Court (concerning State and Sweet Home defendants proposal to strike ("redact") petitioner's pleadings of his allegations, inter alia, of the neglect of his mother's personal and health care (ER 4, Doc.No.138) App.32

Pgs.34-35 of Judge Walker's summary judgment order (containing Judge Walker's opinion of petitioner) App.33-34

Pg.4 of petitioner's declaration in support of petitioner's reply to Kaiser Defendants' opposition to his motions requesting reconsideration of His motion to strike Kaiser's answer and for discovery sanctions and in support of petitioner's opposition to to defendants' motions for summary judgment (ER 158, Doc.No.351) App.35

Pg.42 of petitioner's proposed oversized brief filed in the court of appeals, also

filed as part of request for judicial notice (concerning unfair proceedings in the district court and the prejudice it caused petitioner) App.36

Page 4 of Appellant's brief (concerning the improper conduct throughout the Proceedings causing prejudice to petitioner) App.37

¶ 85 of Second Amended Complaint (same in all versions) (Doc.No.311) App.38

Pg.36, ¶ 112(a) of the original filed complaint (concerning request for preliminary injunction for petitioner's mother) App.39

Federal Statutory Provisions

28 United States Code §§ 455(a) and (b)(1):

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed facts concerning the proceedings …

Federal Rules of Civil Procedure

Rule 1: These Rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Model Code of Judicial Conduct of the American Bar Association

Canon 2(A): A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

Canon 3(B)(2): A Judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

Canon 3(B)(7): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communication made to the judge outside the presence of the parties concerning a pending or proceeding …

causing the visitation restrictions to be imposed as an alternative in the interim. Paragraphs 63, 64, 75(e), 87(d), 93(h); and Exhibit D, pgs.2-3 are adopted and incorporated herein by this reference. Paragraphs 14-22, 31-34, 39, 41, 43, 46-48, 52, 53, 56, 57, 59, 60, 64, 65, & 75 (including subparagraphs (a) – (f)); and Exhibits A, C, and D are adopted and incorporated in this paragraph by this reference as support of these allegations.

89. The "Visitation Restrictions for Tom Jensen," were issued and imposed, and the investigations by the STATE DEFENDANTS were deliberately delayed, without notice to the plaintiff, without a hearing, without valid legal authority, without a right of appeal, without just cause, with discriminatory purpose, motive, intent, and effect, and in retaliation for plaintiff's reports of neglect of his mother's care and his advocacy for its correction. Paragraphs 39, 53, 58, 59, 63-65, 71-75 (including subparagraphs (a) – (f) of ¶ 75), 90, & 91(d)); Exhibits. A, C, and D; and Claim II are adopted and incorporated in this paragraph by this reference as support of these allegations.

90. STATE DEFENDANTS, with deliberate indifference to plaintiff's constitutional rights, recklessly and without due process, acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against plaintiff, which were made to them by SWEET HOME and FAMILY DEFENDANTS, and which were meant to discredit, and defame him and to discredit his reports of neglect of his mother. The reliability of the allegations against plaintiff were not questioned nor given scrutiny, while plaintiff's reports and evidence of neglect of his mother's personal and health care, and retaliation against him for reporting and advocating for its correction were disregarded on the basis that he was allegedly "mentally ill," "mentally unstable," and had "mental problems." Paragraphs 39, 45, 47, 48, 51, 53, 56, 59, 64, & 75 (including subparagraphs (a) – (f)), & 91(d); and Exhibits A, C, and D are adopted and incorporated in this paragraph in support of this allegation by this reference.

91. The acts pursuant to the agreement, meeting of the minds, and conspiracy among these defendants are the following:

(a) Unreasonably, unjustly, and unlawfully barring plaintiff from the defendant SWEET HOME ONE CARE FACILITY for five months in violation of state regulations while the STATE DEFENDANTS' investigations were deliberately delayed in violation of state law. Paragraphs 46, 52,

APP. 1

had unduly delayed and delay would prejudice the defendant, and where plaintiff's contention on appeal seemed hollow and akin to bad faith.

E. The First Claim for Relief Does Not State an Unruh Act or Section 1983 Claim Against Beth Wells and Peter Jensen

By way of the Proposed Third Amendment Complaint, Plaintiff seeks to reinvolve his siblings, the children of Marguerite Jensen, as Defendants in this action for purported violations of Plaintiff's civil, constitutional and statutory rights pursuant to California Civil Code §51 and 42 U.S.C. §1983. Notwithstanding Plaintiff's assertion of "facts" and the requirement at this procedural stage that the Court accept as true all well-pled facts, nonetheless, BETH WELLS and PETER JENSEN respectfully submit that Plaintiff has failed to plead and cannot plead "facts" that would subject the FAMILY DEFENDANTS to liability under California Civil Code §51 or 42 U.S.C. §1983. Plaintiff has failed to allege sufficient facts to plead a viable claim against BETH WELLS and PETER JENSEN under 42 U.S.C. §1983. The gist of Plaintiff's allegations against the FAMILY DEFENDANTS is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct which they believed to be disruptive and detrimental to the peace and proper care of their mother. In an effort to establish tete FAMILY DEFENDANTS' participation in a purported conspiracy to violate Plaintiff's access to SWEET HOME and Marguerite Jensen, Plaintiff alleges that the FAMILY DEFENDANTS effected "a meeting of the minds" with the other Defendants that Plaintiff was "mentally ill," "mentally unstable," and had "mental problems." Plaintiff then alleges that:

> STATE DEFENDANTS, with deliberate indifference to Plaintiff's constitutional rights, recklessly and without due process, acceded to fraudulent, defamatory, pretextual, and retaliatory allegations against Plaintiff, which were made to them by Sweet Home and FAMILY DEFENDANTS, and which were meant to discredit, and to defame him, and to discredit his reports of neglect of his mother."
> [Proposed Third Amended Complaint, paragraph 90.]

//

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agents effecting a constitutional deprivation. Johnson v Knowles, 113 F3d 1114, 1119 (9th Cir 1997).

5/14/03 Order (Doc #224), at 8-9.

Jensen fails to cure the deficiency of his earlier proposed pleading. Jensen has added allegations and exhibits indicating that Peter Jensen and Beth Wells, at times acting through their agent Don Wells, suggested certain visitation restrictions to state officials. Prop TAC, ¶¶ 75(a), 87, Exh D at 1-2. But even the attached exhibits, if taken as true, acknowledge that plaintiff's siblings merely expressed their views to state officials in the hope that they would agree. To the extent the ultimate decision distinctly remained with public officials, Jensen's siblings were therefore not the cause of plaintiff's purported constitutional deprivation. See Prop TAC, Exh D at 2 ("Don and I have reworked the restrictions so that we think they will be approved by CCL. Of course, they must satisfy your concerns."); id, Exh D at 3 (letter by staff attorney from California Department of Social Services rejecting proposed restrictions by Peter Jensen).

Plaintiff has failed to state factual allegations to support a claim that his siblings were willful participants in the particular state action effecting a constitutional deprivation. While plaintiff's family members may have expressed their views and preferences to state officials, the proposed TAC fails to allege that Peter Jensen and Beth Wells were "joint" participants in the decision to impose the visitation restrictions at issue. Accordingly, leave to amend plaintiff's section 1983 claim to add his siblings is DENIED.

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For the Northern District of California

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Proposed SAC, TAC ¶ 91(d). Additionally, as plaintiff has alleged, the visitation restrictions would not have been approved and imposed by state defendants but for (1) State defendants' ratification, without the process due, of these false and discriminatory allegations made by Peter Jensen and Beth Wells pursuant to their improper motives of retaliation and discrimination, Id ¶¶ 89, 90. (2) State defendants' policies that favored and had the effect of favoring care custodians who make false and retaliatory allegations against persons reporting neglect and abuse of the elderly in California long-term care facilities. Id. ¶¶ 92, 93. and (3) State defendants' own discrimination against plaintiff on the basis of disability, Id 91(d).

The foregoing facts give rise to the reasonable inference at the pleading stage that Peter Jensen and Beth Wells acted pursuant to a corrupt agreement with State defendants to violate plaintiff's due process rights as plaintiff has alleged, rather than "merely express[ing] their views to state officials in the hopes that they would agree." The corrupt agreement or conspiracy and acts pursuant to the agreement is the "something more" that shows the joint action constituting state action by Peter Jensen and Beth Wells. [5] See *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983) ("One way the 'joint action' test is satisfied is if a conspiracy is shown.").

B.

THE COURT HAS WRONGFULLY DEPENDED ON OPPOSING PARTIES' FACTS OUTSIDE THE PLEADINGS TO SUPPORT ITS DECISION OF LACK OF JOINT ACTION

The court's decision reaching the conclusion that "[b]ut even the attached exhibits, if taken as true, acknowledge *that plaintiff's siblings merely expressed their views to state officials in the hopes that they would agree*," mirrors the statement of Peter Jensen and Beth Wells that "[t]he gist of plaintiff's allegations against the FAMILY DEFENDANTS is their purported communications with the other defendants regarding their concerns as to Plaintiff's conduct which they believed to be disruptive and detrimental to the peace and proper care of their mother." [6] As set out above, the

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[5] Conspiracy means a combination or agreement to violate or disregard the law conferring equal liability to the co-conspirators. Plaintiff uses the words "corrupt agreement and meeting of the minds," and "conspiracy" interchangeably as words and phrases having the same legal meaning.

court in making its foregoing statement, wholly ignored the factual allegations of the complaint that alleged facts and evidence of Peter Jensen's and Beth Wells' improper motives of retaliation and discrimination on the basis of disability and plaintiff's arguments setting out these things. Additionally, the appearance is unavoidable that Peter Jensen and Beth Wells made these improper statements outside the pleadings in their opposition motions with the intention to influence the court to make a wrongful decision of fact and law.

C.
STATE DEFENDANTS' BELATED DOCUMENT PRODUCTION PROVIDES DIRECT EVIDENCE THAT SUPPORTS PLAINTIFF'S ALLEGATIONS OF CONSPIRACY

The court in refusing to draw reasonable inferences of conspiracy in plaintiff's favor has imposed an impossible barrier to overcome to attain the court's requirements for pleading state action by Peter Jensen and Beth Wells, and serves to reward the defendants for withholding evidence and manipulating the rules. The court is informed of the fact that there was no record of the state proceedings related to the visitation restrictions available to plaintiff at the time the FAC was drafted and that he remained ignorant of the machinations among the defendants that constituted joint action at the time the FAC was drafted, that initial disclosures by opposing parties had been delayed or not made, and that State defendants had withheld documents plaintiff had requested. [7] Notwithstanding this lack of direct evidence, a corrupt agreement and meeting of the minds or conspiracy to deny

---

[6] Peter Jensen and Beth Wells could claim a good faith defense in an *answer*, and assert it in a *motion for summary judgment*, but the defendants and the court cannot ignore the pleadings and presume that such a defense exists on the basis of facts outside the pleadings and prematurely decide the issue on that basis. See plaintiff's Reply to Family Defendants' Opposition to Plaintiff's Motion for Leave to Amend and Motion for Reconsideration with Memorandum of Points and Authorities, Doc # 244 at pg. 5, lns. 4-11. Plaintiff has repeatedly complained to and warned the court of the use of facts outside the pleadings by opposing parties. See Id., and see e.g. Plaintiff's Opposition to State Defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment on Procedural Due Process Claim with Memorandum of Points and Authorities, Doc # 220 at pg. 6, lns. 14-19. The court's wrongful factual finding is now a specter of prejudice to plaintiff overhanging the proceedings unfairly adding to past prejudice..

[7] See FAC, SAC, proposed TAC ¶¶ 71-75, Plaintiff's Notice and Motion for Leave to Amend, Doc # 196 at pgs. 5-8, and plaintiff's April 22, and June 16, 2003 letters regarding discovery dispute over document production by State defendants.

reconsideration under FRCP 60(b) is not a "substitute for appeal").

Plaintiff moves the court to grant leave to file a motion for reconsideration of its May 14 and July 31, 2003, orders. Because the merits of plaintiff's motion apply only to the July 31, 2003, order, such order is the only one the court considers. Plaintiff's motion relies on the last two bases for reconsideration, Civ LR 7-9(b)(2) and (3). The court considers plaintiff's contention under Civ LR 7-9(b)(3) first.

A

Plaintiff argues that the court failed to consider plaintiff's material facts and dispositive legal theories. Pl Mot (Doc # 253) at 2. Plaintiff fails, however, to bring to the court's attention any dispositive legal theories or material evidence that the court did not address in its previous order. Plaintiff argues that the court failed to treat the "factual allegations of the complaint as true and draw all reasonable inferences in plaintiff's favor." Id. Plaintiff does not argue, nor could he, that the court disregarded the appropriate legal standard for a motion to amend. Instead, plaintiff argues that the court misapplied the standard.

Plaintiff's motion thus evinces a failure to understand the distinction between a claim that the court disregarded a legal argument and a claim of disagreement with the court's decision. If a party raises, and the court fails to address, a dispositive legal argument, that party may bring a motion for leave to file a motion for reconsideration to allow the court an opportunity to address its error. See Civ LR 7-9(b). A motion for leave to file a

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motion for reconsideration is not an appropriate vehicle to vent frustration with a court's order, nor is it a second chance to raise the same arguments.

The court clearly rejected plaintiff's argument that Peter Jensen and Beth Wells acted jointly with state officials. Plaintiff's fervent disagreement with the court's previous order does not provide grounds to file a motion for leave to file a motion for reconsideration. Indeed, the Civil Local Rules state that a party may be subject to sanctions for "repeat[ing] any oral or written argument made by the applying party in support of or in opposition to the interlocutory order in a motion for leave to file a motion for reconsideration." Civ LR 7-9(c). Repeated and meritless motions for leave to file motions for reconsideration needlessly slow the litigation process. Although the court finds that imposing sanctions at this time is not appropriate, plaintiff is admonished that "although he is * * * representing himself in this action, he is nevertheless obligated to follow the same rules as represented parties." King v Atiyeh, 814 F2d 565, 567 (9th Cir 1987).

B

Plaintiff also argues that evidence unavailable at the time that the court considered plaintiff's earlier motion provides a basis for the court to reconsider its earlier ruling. Plaintiff's motion on this ground may more properly be construed as a motion for leave to amend, because nothing in the court's previous order needs to be "reconsidered" to determine whether plaintiff's further allegations suffice to state a claim against

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failing to give plaintiff fair notice, and some are insufficient as a matter of law. *Heller Financial, Inc. v. Midwhey Power Co., Inc.*, 883 F.2d 1286, 1294-95 (7th Cir. 1989). *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

The foregoing insufficiencies of Kaiser defendants pleadings' prejudice plaintiff by, inter alia, requiring plaintiff to prove facts that should be admitted by Kaiser, causing delay, waste of time and oppressing plaintiff. They also cause plaintiff the necessity of engaging in unnecessary discovery, unnecessarily confuse the issues and mislead the court. FRCP 1.

ISSUES TO BE DECIDED

1. Are Kaiser defendant answers insufficient because they are not based on a reasonable inquiry under the circumstances?

2. Are allegations in Kaiser defendants' answer that factual allegations of the SAC are "irrelevant" or are "legal conclusions that do require a response" proper pleadings under FRCP 8(b)?

3. Are Kasier defendants' affirmative defenses insufficiently pleaded, and/or are they insufficient as a matter of law?

4. Has plaintiff been prejudiced by Kaiser defendants' answer and related conduct?

STATEMENT OF FACTS

There are two sources of knowledge and information in Kaiser defendants' possession that were readily available to Kaiser defendants for pleading their answer. One source of readily available information were the documents alleged in the complaint, which include three letters from plaintiff to Kaiser defendants (Exhibit A). The other source of readily available information were plaintiff's mother's Kaiser medical records including Kaiser medical records for plaintiff's mother for the year 1998, Kaiser medical records of plaintiff's visits with his mother to defendant Bill Jue MD, Kaiser medical records related to plaintiff's visits with Dr. Derek Jue, Kaiser medical records related to Kaiser defendants' contact with the Ombudsman, and Kaiser medical records related to

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plaintiff's mother's admission to the hospital with acute symptoms of urinary tract infection (Exhibit B).[1]

Plaintiff's mother's medical records were in Kaiser counsels' possession well before they answered the complaint and well before their answer was due . Plaintiff received the medical records excerpted herein by personal service from then Kaiser counsel Steve Chu on or about Nov. 5, 2003 in response to plaintiff's document requests. Kaiser's answer was due on January 29, 2004, 14 calendar days or ten working days after the court order denying Kaiser defendants' motion to dismiss. Kaiser defendants answer was actually served on February 18, 2004

Plaintiff's pleadings and Kaiser defendants' answers concerning these sources of knowledge and information that Kaiser defendants failed to use for pleading purposes, which are the subject of this motion, are of the following general categories of the evidence just enumerated.

PLAINTIFF'S PLEADINGS AND KAISER DEFENDANTS' ANSWERS RELATED TO PLAINIFF'S LETTERS TO KAISER DEFENDANTS

Plaintiff has pleaded and verified that he sent three letters to Bill Jue MD. SAC ¶ 30. Two of the letters were identified by date, one sent to defendant Jue dated May 26, 1999, SAC ¶ 31, and the other dated June 24, 1999, sent to defendant Jue, delivered in person to the Patient Representative of Kaiser – Milpitas, and also sent to Peter Jensen and Beth Wells. SAC ¶ 32. The third letter was dated September 3, 1999. Kaiser defendants admit receiving these letters, but do not admit the contents of the letters that plaintiff has plainly pleaded.

Paragraph 26: Paragraph 26 states that "After the second visit to said defendant Bill Jue MD, which was after Mrs. Jensen had dislodged the mucous plug from her lungs, the clear then purulent mucous that was observed by the plaintiff was expelled by her coughing."

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[1] Kaiser defendants' medical records were produced form three separate Kaiser facility sources identified as "Kaiser Medical Center Milpitas PMG Vol 2" (clinic records for years 1998 to 2000), "Kaiser Medical Center Santa Clara PMG Vol 1," (hospital records for year 2000), "Kaiser Medical Center Hayward PMG Vol 1" (hospital records years 1998, 2000) "Kaiser Medica[illegible] KFH Vol 2 (hospital records for year1998). Each set of records has a cover shee[illegible] numbered beginning with the number one in bold type in the lower right hand corn[illegible]

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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES TO BE DECIDED

Have Kaiser defendants without substantial justification failed to comply with Rule 26(a) by not providing plaintiff with required disclosures under Rule 26(a)(1)(A), (B), and (D)?

Has plaintiff been harmed by Kaiser defendants' failure to comply with Rule 26(a) and by Kaiser defendants' persistent violation of the federal rules and the case management order?

Have Kaiser defendants persistently and egregiously violated Rules 11, 16(f) and 26(g) and the court's case management order by failing to do a reasonable inquiry under the circumstances before filing their documents, and by serving their responses to plaintiff's document requests in the first instance without a privilege log in violation of the court's case management order, and in the second instance by refusing to waive any allegedly assertable privileges and again failing to produce a privilege log for privileges they had claimed?

Have Kaiser defendants acted willfully and in bad faith?

Has plaintiff been substantially prejudiced and injured by Kaiser defendants' conduct?

STATEMENT OF FACTS

The case management conference occurred in this action on September 23, 2003. Using the date of the conference as the start of the time period, Kaiser defendants initial disclosures were due to be served to plaintiff on October 6th.

On October 2, 2003 this court issued its case management order. The order stated the following on page 1:

"No generalized claims of privilege or work product protection shall be permitted. With respect to each communication for which a claim of privilege or work product is made, the asserting party must at the time of its assertion identify: (a) persons making and receiving the privileged or protected communication, including affirmation that no unauthorized persons have received the communication, (c) date of the communication and (d) subject matter of the communication. Failure to furnish this information at the time of the assertion will be deemed a waiver of the privilege or protection."

Plaintiff served his request for documents to Kaiser defendants on August 29, 2003 (copy of proof of service attached herein as Exhibit A) After the case management conference on September 23, 2003, Kaiser counsel Steve Chu asked for three extensions of time for their production of documents. In his discussions with Mr. Chu in regard to these extensions of time, plaintiff inquired about the extent of his document production. Mr. Chu indicated to plaintiff that Kaiser defendants would not claim privileges for his mother's and father's medical records and for documents he had requested from the personnel records of Minerva Mostrales. Plaintiff relied on Mr. Chu's representations in granting the extensions of time he requested and in the decisions plaintiff made related to his motion to compel which he filed on November 3, 2003. On Nov. 6, 2003, Kaiser defendants' served plaintiff their response to plaintiff's document requests (copy of Kaiser response attached herein as Exhibit B). In their response, Kaiser defendants claimed generalized privileges without a privilege log and produced documents that appeared to be solely documents contained in plaintiff's mother's medical records for the years 1998-2000.

On January 5, 2004, the court issued its order denying Kaiser defendants' motion to dismiss. Kaiser defendants' answer was due on January 19th . On February 4, 2004, plaintiff initiated meet and confer with Kaiser defendants by telephone and followed-up with a series of 5 letters, the last on February 20th. In these communications, plaintiff raised issues for discussion that included the inadequacy of the Kaiser defendants responses to plaintiff's document requests, Kaiser defendants' failure to comply with the case management order by their failure to produce a privilege log with their response to plaintiff's document requests and their consequent waiver of privileges according to the terms of the order, Kaiser defendant's failure to answer the complaint, and Kaiser defendants' failure to make their initial disclosures. Kaiser defendants made three replies by letter.

On February 18th, Kaiser defendants answered the complaint contrary to plaintiff's suggestion in his meet and confer letters that their answer be delayed until they had done a reasonable inquiry under the circumstances. On March 15, 2004 Kaiser defendants produced a revised response to plaintiff's document requests (copy attached herein as Exhibit C) without waiving any privileges and without producing a privilege log, and produced only one additional document. In their response to

revised Request No.'s 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, Kaiser defendants inconsistently claimed alleged "diligent search" without locating any allegedly privileged responsive documents, for some requests, but not for others, and promised a privilege log if any were later found. In their responses to Request No.'s 13, 15, 17, 18, 20, 21, 23, and 24 Kaiser defendants again claimed generalized privileges without a privilege log and without explaining lack of production.

Kaiser defendants' first responses to plaintiff's document requests appear to have included only plaintiff's mother's medical records and no documents from any other source. The medical records are responsive to some of plaintiff's document requests other than for the medical records themselves, but do not appear to contain any documents related to any allegations Minerva Mostrales' or any other person made against plaintiff.

Kaiser defendants second responses to plaintiff's document requests after meet and confer contained only the following document which is included as the last ~~two~~ three pages of Exhibit C attached herein: Defendant Bill Jue M.D.'s "Unusual Occurrence Report" dated 9/7/99.

Kaiser defendants have not disclosed the identity of persons likely to have discoverable information relevant to their defenses and the identity of the subjects of the information, nor have they produced a copy or description by category of documents and things in their custody and control that are relevant to their defenses.

ARGUMENT

KAISER DEFENDANTS HAVE NOT MADE THEIR INITIAL DISCLOSURES

Kaiser defendants have not disclosed the identity of persons likely to have discoverable information and the subjects of their information Kaiser defendants may use to support their defense as required by Rule 26(a)(1)(A).

Only one of Kaiser defendants' documents produced in response to plaintiff's document requests appears relevant to their defenses, but only if construed in their favor. See last two pages of

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April 12, 2004

VIA FEDERAL EXPRESS

Hon. Vaughn R. Walker
U.S. District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Tom Jensen v. Sweet Home Care
U.S.D.C. No. C 00-03261

Hon. Judge Walker:

On March 26, 2004, plaintiff filed a motion against Kaiser Foundation Health Plan, Inc., Kaiser Foundation Hospitals, The Permanente Medical Group, Inc., and Bill Jue, M.D. ("Kaiser defendants") concerning their Rule 26(A) disclosures. The motion is set for hearing on June 3, 2004.

This motion is in essence a discovery motion. The October 2 CMC order specifically provides that "The court will not entertain formal motions to compel discovery without prior leave of court. Discovery disputes should be brought to the court's attention by: (1) telephone conference with the court and all parties scheduled by the court, or (2) letter not exceeding two pages, with copies served on all parties, and advising the court that a dispute exists and its nature."

The Court therefore should not entertain Mr. Jensen's motion because he has not obtained the Court's permission before filing this motion. The Kaiser defendants are ready to oppose the motion on its merit, unless otherwise directed by the Court. Please direct your staff to advise me

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before May 3, 2004, ten days before the due date for Kaiser's opposition on May 13, if an opposition is required. Thank you very much.

Very truly yours,

Cindy S. Yau

CSY:mb
Cc. Tom Jensen ✓
Sonia Martin
Susan King

APP. H

FILED

APR 2 7 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN,

Plaintiff,

v

SWEET HOME ONE CARE FACILITY, et al,

Defendants.
_____/

No C-00-3261-VRW

ORDER

Plaintiff recently filed two motions. Plaintiff first moves the court to strike the Kaiser defendants' answer to plaintiff's second amended complaint. Pl Mot (Doc # 296). Plaintiff also moves the court for various discovery-related relief, including sanctions. Pl Mot (Doc # 302).

The parties are scheduled for a dispositive motions hearing date of October 28, 2004. The fact discovery deadline in this case is September 30, 2004.

The court's standing orders require a party to obtain leave of court before filing a motion to compel discovery responses. See Standing Orders at ¶ 2. To streamline this

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litigation, the court deems it appropriate to extend this requirement to all motions. Accordingly, unless the parties are granted leave by the court for good cause shown, no motions will be heard prior to the October 28, 2004, dispositive motions hearing date. Leave may be requested by:

1. Requesting a telephone conference with all parties or
2. Sending a letter to the court, not exceeding two pages, with copies served on all parties.

As noted above, plaintiff has two pending motions. The court TERMINATES plaintiff's motions to strike and for various discovery-related relief and VACATES their respective hearing dates. If plaintiff seeks to strike the Kaiser defendants' answer, he may include such an argument in any dispositive motion to be heard on October 28, 2004. If plaintiff seeks to bring a discovery-related issue to the court's attention, he may file a letter, not exceeding two pages, alerting the court to the nature of the dispute.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge

United States District Court
For the Northern District of California

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Tom Jensen
PO Box 614
Oakland, CA 64604
(510) 918-6667

FILED
SEP 14 2 11
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Re: Jensen v. Sweet Home, C-00-3261 VRW

Judge Vaughn R. Walker
US District Court, Northern District of California
450 Golden Gate Ave.
San Francisco, CA
ss

Sept. 14, 2004

Dear Judge Walker,

Pursuant to the court's April 27 Order, plaintiff requests leave by this letter to file a motion to stay.

In its 1/4/04 Order, pgs. 11-12, the court stated that "It may be that plaintiff *will be unable to unearth* any evidence of agreements between Sweet Home One and Kaiser to deny plaintiff his rights" (emphasis added), which can be addressed in a motion for summary judgment.

In spite of plaintiff's comprehensive and successive document requests trying to elicit information, besides plaintiff's mother's medical records, Kaiser defendants have produced only their initial disclosures of 3 documents, two of which were plaintiff's letters. While admitting they have files of relevant documents, Kaiser defendants have claimed blanket privileges and objections to plaintiff's document requests without producing any documents beyond their initial disclosures, and without producing any privilege log despite the court's order requiring one. Kaiser defendants have also provided virtually no answers to plaintiff's interrogatories. What information they have provided has been in belated and untimely updates, giving clear evidence that Kaiser failed to do a reasonable inquiry before responding in the first instance, and that their objections were frivolous and made for the purpose of delay. Like State and Sweet Home defendants, Kaiser defendants have refused to agree to stipulate to low-cost depositions. Given Kaiser's discovery conduct, however, depositions would be expected to be unproductive and wasteful of plaintiff's time and resources. Kaiser defendants have closed off all avenues for discovery of information to plaintiff.

Plaintiff filed two motions asking for sanctions against Kaiser defendants for violation of the case management order, for persistent violation of the federal rules, and for failing to do reasonable inquiries before filing their answer and serving their responses to plaintiff's discovery requests. In response to Kaiser defendants' 4/12/04 letter addressed directly the court and which was not served, the court "terminated" plaintiff's motions, and ordered plaintiff not to file any motions without leave of the court and to ask the court for discovery relief by two page letter pursuant to the court's standing orders. Plaintiff has asked for such relief, but the court has failed to respond in spite of the court's standing orders that states that "the court *will* contact the parties to resolve the dispute" (emphasis added). The court has effectively closed off all avenues for discovery relief to plaintiff.

A civil trial is a quest for truth. Instead of seeking the truth, Kaiser defendants and the court have closed off all avenues for discovery of information to plaintiff. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "[T]he spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts by ... unnecessary use of tactical weapons or evasive responses." *Advisory Committee Notes*, 1983 Amendment.

The court has given ample evidence of a predisposition favoring opposing parties. Besides failing to grant plaintiff discovery relief, the court has, like the previous court before appeal, failed to treat the factual allegations of the complaint as true and draw all reasonable inferences in plaintiff's favor. Plaintiff had alleged that Peter Jensen and Beth Wells had acted with improper motives in advocating for the visitation restrictions. Instead of treating these allegations as true, this court adopted the opposing parties factual contention advanced in their motion to dismiss that Peter

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Jensen and Beth Wells had instead acted in good faith in reaching its decision on plaintiff's motion to amend. Additionally, the court clearly failed to treat plaintiff's factual allegations of neglect of his mother's personal and health care as true. Peter Jensen and Beth Wells by clear inference from these facts would be presumed to have acted in bad faith if plaintiff's allegations of the neglect of his mother's personal and health care were treated as true.

The court in failing to treat the factual allegations of the complaint as true and drawing all reasonable inferences in plaintiff's favor, refusing to even consider any of plaintiff's requests for discovery relief, and other such incidents beyond the space and scope of this letter motion, raises the issue of the threat that a wrongful decision will be made based on bias and prejudice and manipulation of the facts and procedural rules to conform the evidence and the court's ultimate decision to a predetermined outcome.

As a result of Kaiser defendants' discovery conduct and the court's refusal to provide plaintiff relief, plaintiff has been deprived of access to documentary evidence and evidence through interrogatory responses relevant to proof of his claims. Given the foregoing evidence of the court's bias and prejudice, the appearance is that the court effectively and sympathetically alerted Kaiser defendants to withhold material evidence of discrimination in its 1/4/04 Order, and that the court is cooperating with Kaiser defendants to this end by terminating plaintiff's motions seeking sanctions and related relief, by failing to enforce its case management order requiring a privilege log, and by failing to respond to plaintiff's requests for discovery relief and for leave to file motions to compel.

A reasonable person viewing these circumstances would agree that these circumstances are fundamentally unfair to plaintiff and indicate that the court is biased and prejudiced against plaintiff and has a predisposition favoring opposing parties. The plaintiff, by such unreasonable and unfair conduct, is being subjected to a trial by ordeal by unnecessary delays, expenses, and unnecessary measures plaintiff must make to protect his procedural rights and preserve the issues of the unfairness of the proceedings for a second appeal instead using his time for preparation for trial. Plaintiff is therefore doubly prejudiced by this conduct. The circumstances are especially bad because the depletion of plaintiff's financial resources, and his chronic health problems that significantly multiply the time necessary for him to carry out his obligations in this litigation, make him especially vulnerable to becoming a victim of oppression, and make the oppressive conduct of the opposing parties and the court particularly odious.

Because of the lack of Kaiser defendants' production of documents, and the court's refusal to provide discovery relief, plaintiff is not now fairly prepared to bring a dispositive motion against Kaiser defendants or to respond to a dispositve motion from Kaiser or to go to trial. While plaintiff has substantial circumstantial evidence of Kaiser defendants' discrimination and conspiracy to discriminate from other sources, plaintiff lacks documentary evidence Kaiser defendants have withheld that, based on the circumstantial evidence of discrimination, is reasonably likely to be expected to dispositively support plaintiff's claims.

Plaintiff is also not fairly prepared to bring or respond to any dispositive motions involving the State and Sweet Home defendants or to go to trial because he lacks the Ombudsman's documents he subpoenaed, and the Janet McKenzie documents he requested from State defendants and the Beth Wells' conservatorship and other documents he subpoenaed for which work-product and attorney-client privileges and protections have been waived because both parties failed to produce a privilege log required by the court's case management order. The court has not responded to plaintiff's requests that the court order all of this information produced. Plaintiff must be given access to the evidence he requested to overcome the appearance of unfairness in this action.

Plaintiff requests that the court stay the proceedings until the discovery disputes have been fairly considered and settled in a manner consistent with the federal rules and basic due process principles, and plaintiff has received all the documents and other information he is entitled to.

Sincerely,

Tom Jensen

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dispute of material fact whether the decision to order, and approval of, the visitation restrictions were based, partly (if not completely) on Jensen's strange and dangerous conduct, as well as his siblings' genuine concern for their mother's well-being. Doc #332 at 17 ("[Plaintiff] had his visits restricted because of his own bizarre and disturbing behavior.").

Accordingly, for Jensen to survive summary judgment on these claims he was required to come forward with admissible evidence establishing an issue of fact whether misperceptions regarding his mental health were the sole basis for imposing the visitation restrictions. Jensen's proffered "evidence" establishing that his misperceived mental disability was the sole reason for his exclusion, however, falls far short of meeting this requirement.

Jensen relies upon statements made by his siblings to various state and Sweet Home defendants. Doc #344 at 25-26. For example, Peter Jensen wrote to DSS that he thought Jensen was "mentally unbalanced." Doc #311, Ex C at 1. Also, Beth Wells told Goupal that "Tom is disruptive and unbalanced." Doc #345, Ex A at 5. These are simply two representative examples of several statements, all to the same effect, made by Jensen's siblings to various defendants. Moreover, Jensen offers a letter from Monstrales to state defendants stating that "it is Tom's mental and behavioural [sic] problems that prompted him to bring [his mother] to [Kaiser's] office." Doc #311, Ex C at 3 (emphasis added). The foregoing "evidence," according to Jensen, "support[s] the strong inference that discrimination on the basis of disability was determinative of the acts and decisions of [s]tate defendants."

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United States District Court
For the Northern District of California

Doc #344 at 25.

First, all of these statements are hearsay within the meaning of FRE 802 and Jensen has made no argument that these statements are admissible under an exception to the hearsay rule. But more importantly, this evidence actually belies Jensen's assertion, as Monstrales' letter to state defendants explicitly references Jensen's "behavioral problems" (i e, his conduct), thus negating the assertion that only Jensen's perceived mental illness was at issue in imposing the visitation restrictions.

Upon viewing all of the evidence, it is beyond dispute that state defendants' actions were based in large part (if not entirely) on Jensen's bizarre conduct towards his mother and the anxious reactions this behavior elicited from his siblings. No reasonable jury could find otherwise. Accordingly, as Jensen's perceived mental disability was not the sole basis for imposing the visitation restrictions, state defendants' motion for summary judgment on Jensen's ADA and RA claims is GRANTED.

VIII

In sum, the court DENIES Jensen's motions for reconsideration (Docs #336, 338), DENIES Jensen's Rule 56(f) application (Doc #358) and GRANTS all defendants' motions for summary judgment (Docs ##322, 329, 332).

On a side note, after fours years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these

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Subject: Brother Tom

From: pljense@ibm.net
To: Hopalong@tweney.com
Date: 06-07-99, 06:28:35 PM

Dear David,

I think that the only way to drop out and go sailing is to throw your computer over the side and stay out of the country.

Well, Tom is still in Fremont. He called Beth this evening and wants her and Mama to go to counseling with him regarding Mama's care (or lack of). Needless to say this freaked Beth out. So she was thinking the 3 of us could meet with Tom/counselor.

I told her no way that I would meet with Tom with a counselor. I suggested that you and I might meet with Tom alone. We need to keep Beth out of it as much as possible. So we are back to the same situation of the note that you sent me on 04/09.

I object to the concept that Tom can come into town, make accusations and judgements, and expect us to hop to and respond. (Too long a story to describe here.) My take is to just stonewall him but Don reasons that it is too easy for him to go to Social Services and file a complaint of "elder abuse" - and I have to agree with him on that. I have a call in to Ms Jones, the next door neighbor and family law specialist, on how to handle this. I am thinking of a restraining order on Tom. He has been independently bringing her to Kaiser for medical treatment of "problems" which he has dignosed, much to the distress of the Kaiser doctor. Plus, he has been causing the problems with Mama as documented in the letter from Sweet Home. Hope to hear from Ms. Jones before I close this off.

I understand you will be arriving on Friday. We can talk on Saturday and perhaps meet Tom on Sunday. I am no longer concerned about Tom's feelings on this subject. All of the rest of the siblings, plus in-laws, are in agreement with how Mama's care is being handled. Beth and I go into high blood pressure alert every time we hear from Tom. I have had it with

him
jerking me(us) around.

Well it is after 8 and Ms. Jones has not called back yet ao I will close
this off and update you later.

Peter

don't care & not concern of their mother. Tom has been Mr.Gerald and Marguerite Jensen's problem son, heart breaking to them ever since. Tom is the "family problem/trouble maker". The black sheep of the family. Its embarassing to the family since all of them are well educated and professional.

4. Upon Marguerite Jensen admission to Sweet Home; Phyllis Beth Wells made the arrangement and signed the Facility Admission agreement on behalf of all other family members, Peter Jensen, David Jensen & Allan Jensen. We never knew nor dealt with Tom Jensen for several months, probably more than a year. He was never part of the family decisions. With this fact, we always abide with Phyllis Beth Wells and Peter Jensens' decisions for the best welfare of their mother.

5. Dr Bill Jue of Kaiser Permanente and Dr. D. Jue of Fremont, Ca, strongly believed and knew that Marguerite Jensen is being cared properly. They both knew and confirmed that it is Tom's mental and personal behavioural problems that prompted him to bring Marguerite to their offices for any for inappropriate complaints and uneventful medical visits. For which he got upset with the doctors for not confirming his own made-up diagnosis. He has bothered, demanded and threatened Dr. Bill Jue. For this, Tom has been denied access to Kaiser premises, not allowed to bring Marguerite for any medical consultations. Securities are alerted on his presence to deal with him.
Enclosed a copy of Don Wells' letter regarding his conversation with Dr Jue.

The Ombudsman also came and investigated Sweet Home due to Tom's Complaints. The Family were contacted too, and conclusion of allegations was without merit. Enclosed two (2) letters from Don Wells regarding their conversations with the Ombudsman.

All the agencies involved, the family members, the medical doctors and the Ombudsman were all together against Tom's unacceptable, inappropriate behavior. We all have the duty and responsibility to protect Marguerite Jensen. So we all were working together and doing our best to protect Marguerite from detrimental effects on her mental, emotional, and physical aspect of life and give her dignity and peaceful, non-stressful life.

With all these reasons and facts mentioned with proper documentations. We strongly felt that giving us a citation was unfair, unjust, discrimanatory and wrongly accused us for not allowing our residents to have visitors.

So, we appeal that you reconsider all these reasonable facts and evidences, regarding Anita Gopaul, LPA citation of Personal Rights.

May the Lord bless you and help you make the best and right decision, to give justice and merit for people who are sincere of serving, helping and caring for people.

Sincerely yours,

Minerva Mostrales
Licensee/Administrator

Soledad Almocera
Licensee/Administrator

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Cal. Code Regs., § 87572(11)). The plaintiff reported this action to Beth Wells, but she took no action and made no comment in regard to that order.

13. The plaintiff observed that his mother appeared to have no significant signs or symptoms of asthma during his frequent visits with her at defendant SWEET HOME during 1998.

Plaintiff's Observations of Neglect of his Mother

14. During frequent visits with Mrs. Jensen beginning in April of 1999, the plaintiff observed the following circumstances of neglect of her personal and health care at defendant SWEET HOME:

15. Mrs. Jensen suffered a prolonged and untreated episode of illness characterized by episodes of severe breathing distress, chronic cough, facial features darkened by a reddish flush, a haggard and distressed appearance, weakness and fatigue, dizziness and vertigo, and confusion with light physical activity. The course of her illness spanned over three months, and during its course Mrs. Jensen coughed up a large Y-shaped mucous plug then large quantities of clear then purulent mucous. In the aftermath of her illness, Mrs. Jensen exhibited continuing signs and symptoms of breathing and other distress that she had not suffered previously.

16. The plaintiff observed negligent and improper use of and oversight of use of Mrs. Jensen's metered-dose-inhalant asthma medication by a resident caregiver of defendant SWEET HOME. The plaintiff observed a persistent white coating on his mother's tongue that was apparent for a prolonged period that the plaintiff is informed and believes was thrush, and Mrs. Jensen complained to him that she was denied her asthma medication when she felt she needed it.

17. The plaintiff observed that his mother was reacting to asthma triggers in the defendant SWEET HOME facility, and that her signs of breathing distress would improve while she was outdoors and deteriorate when she returned to said facility. Mrs. Jensen herself commented frequently on this difference in air quality and on her favorable response to the outdoor air. The plaintiff observed that his mother's room was dusty and that the dust was not cleaned week to week. The plaintiff found an accumulation of dust and debris around the wall edge of Mrs. Jensen's bed. The HEPA air filter in her room had a coating of white dust on the pre-filter.

18. The plaintiff found his mother routinely in wet diapers when he arrived for visits, and he did not observe regular visits to the toilet sponsored for her by resident caregivers of defendant SWEET HOME. The plaintiff, by attending to his mother's toileting needs himself while visiting, found that his mother was not incontinent, but could reliably hold her urine for two hours, and would tell him when she needed to go to the bathroom. The plaintiff observed that his mother did not know how to ask for assistance from resident caregivers of defendant SWEET HOME when she needed to go to the toilet. When plaintiff inquired of his mother what she did when she needed to go to the toilet when he was not present, she replied, "I forget about it."

19. The plaintiff observed the multiple reuse of previously used disposable gloves by a resident caregiver for cleaning Mrs. Jensen after her toilet activities. He observed a resident caregiver, using said previously used gloves, clean his mother after her toilet activities by dipping her gloved fingers into a jar of water and swapping Mrs. Jensen's anal area. Said caregiver, using the same gloved hand and jar of water, then swabbed her genital area in the same manner. Another similar unsanitary practice by the same caregiver was observed by the plaintiff at another time. Said caregiver has been the regular and principal caregiver for Mrs. Jensen at defendant SWEET HOME.

20. The plaintiff observed that his mother's personal hygiene was, for a prolonged period, neglected. She had body odor, greasy hair, and smelly feet. The plaintiff twice during this period found her feet covered by layers of scaled skin. Her breath was extremely fetid and her teeth and dentures were unclean. Mrs. Jensen complained to the plaintiff of a bad taste in her mouth, which caused her to spit out her food after she chewed it. She complained to the plaintiff about her dirty hair, and told him that she was afraid to express her needs in regard to her personal hygiene for fear of causing offense and suffering reprisal.

21. Mrs. Jensen complained repeatedly to the plaintiff that she had no activities or exercise, which lack concerned and distressed her. The plaintiff observed that this was a valid complaint, and that she spent virtually her entire day in idleness, and that her frailty constrained her own exercise of her interests in activity, and that assistance in that regard was necessary and not provided for.

22. In the midst of these observations by the plaintiff, and before he became aware of the total

scope of the neglect of his mother as related herein, Mrs. Jensen confided to him that "they do things I know aren't good for me," adding that she didn't know whether to object or to go along to avoid causing offense.

23. The plaintiff informed his mother's doctor defendant BILL JUE MD, Peter Jensen and Beth Wells, and the "Patient Representative" of defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS of his mother's health care needs, of the neglect of her care he had observed, and of Mrs. Jensen's expressions of dissatisfaction with the circumstances of her care. The plaintiff's activities in that regard, and said defendants' responses to the plaintiff's information are more fully described below.

Plaintiff's Attempts to Obtain Medical Treatment for his Mother

24. The plaintiff made two visits with his mother to her doctor defendant BILL JUE MD at defendant KAISER PERMANENTE MEDICAL OFFICES - MILPITAS, the first soon after he arrived in April of 1999 after an approximate three months absence from Mrs. Jensen's presence, and after he first observed the signs and symptoms of her illness as described in paragraph 15 above. At neither visit did defendant BILL JUE MD offer any medical opinion or diagnosis to the plaintiff, or any treatment for his patient Mrs. Jensen.

25. At one of these office visits, the plaintiff informed defendant BILL JUE MD of his concern that Mrs. Jensen was reacting to asthma triggers in the defendant SWEET HOME facility, specifically mentioning that he had found an accumulation of dust and debris around the edge and under her bed. Defendant BILL JUE MD replied that he had allergies too, and that his under-bed was probably dirty as well. The plaintiff also informed said defendant that he suspected the heating system air ducts to be a source of asthma triggers for Mrs. Jensen. Said defendant replied that he didn't believe that air ducts were cleaned, and that all that needed cleaning were air filters.

26. After the second visit to said defendant, which was after Mrs. Jensen had dislodged the mucous plug from her lungs, the clear then purulent mucous that was observed by the plaintiff was expelled by her coughing.

27. Subsequent to this sign, on July 7, and about three months after he had first observed Mrs.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN
P.O. Box 614
Oakland, CA. 94604
(510) 918-6667

Plaintiff in propria persona

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TOM JENSEN,

Plaintiff

vs.

SWEET HOME ONE CARE FACILITY, et al.,

Defendants

No. C-00-3261-VRW

DECLARATION
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
SUMMARY JUDGMENT MOTIONS

Date: October 28, 2004
Time: 2:00 p.m.
Place: Courtroom 5, 17th floor
Before: Honorable Vaughn R. Walker

I, Tom Jensen, declare:

1. I am the plaintiff in this action.
2. The Exhibits A and B to plaintiff's motions for summary judgment are true and correct copies of the originals.
3. All of the documents written by my hand are true and correct as to the facts and circumstances they state.
4. All the audio tape transcripts I have made of my mother's words are true and correct as to what she said.
5. I never arrived at Sweet Home before 8:00 a.m. I believed that the visiting hours were 8:00 a.m. to 5 p.m. No one ever told me otherwise and no one ever objected in my

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presence to my arriving at that hour. There was never any activity at Sweet Home when I arrived at 8:00 a.m.

6. The Dec.2, 1999 fax sent to me by Anita Gopaul is not a true and correct copy of the document I actually received.

7. I never engaged in any improper activity with my mother at Sweet Home or anywhere else.

8. The facts as I have stated them in ¶¶ 11-74 of the Second Amended Complaint are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Oct. 7, 2004, By Tom Jensen

Tom Jensen
Plaintiff in propria persona

United States District Court
For the Northern District of California

FILED

JAN 31 2005

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOM JENSEN,

Plaintiff,

v

SWEET HOME ONE CARE FACILITY, et al,

Defendants.

_____/

No C 00-3261 VRW

ORDER

After four years of contentious litigation, an intermediate appeal to the Ninth Circuit and a literal mountain of filed documents (occupying eleven large file folders), this case has finally reached its final summary judgment phase. As the litigation currently stands, plaintiff Tom Jensen (Jensen) alleges several federal and state law causes of action against an inordinate number of defendants. Doc #311. Currently before the court are all defendants' separate motions for summary judgment. Docs ##322, 329, 332. Also before the court are Jensen's two motions for reconsideration of the court's orders denying his

Tom Jensen appeals pro se from the district court judgment dismissing his civil rights action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1139 (9th Cir. 1996). We affirm in part and reverse and remand in part.

Jensen contends that the district court erred by dismissing his claim that his rights were violated by the restrictions placed on his visitations to his mother, a resident at Sweet Home One Care Facility. We agree.

Although the district court properly concluded that Jensen's pleadings were sufficient to allege the defendants acted under color of state law when they imposed restrictions on his visits, the district court failed to treat Jensen's allegations as true and draw all reasonable inferences in his favor when ruling on the motion to dismiss. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Because Jensen had sufficiently alleged that the private defendants were state actors, they could not unreasonably restrict his First and Fourteenth Amendment rights. In addition, Jensen alleged that his brother had falsely accused him of being disruptive. The district court improperly relied on this accusation to conclude that Jensen had failed to raise cognizable claims pursuant to the First and Fourteenth Amendments. Accordingly, the dismissal of Jensen's

SECOND REPLY TO MOTIONS TO DISMISS

Some of the matters of the motions and replies of the Defendants are inappropriate as matters relevant to motions to dismiss. It is the legal issues of "subject matter jurisdiction," "claims upon which relief may be granted," and immunity that are properly considered. Not counterclaims that are not verified or supported by facts or affidavit or amenable to reply.

For purposes of the Motions to Dismiss, the facts of the Amended Complaint should be considered as true and viewed in the light most favorable to the Plaintiff (National Abortions Federation v. Operation Rescue 8 F 3d 680, 681 (9th Cir 1993). Matters outside the pleadings of the complaint should be disregarded (FRCP 12(b)). It should be assumed that there is evidence to support the facts and the claims.

The Facts of the Amended Complaint are verified. The Plaintiff has sworn under penalty of perjury that they are true. The Facts clearly state serious neglect of the care of Mrs. Jensen and serious deterioration in her health that was not medically treated.

The Plaintiff, under these circumstances, was clearly obligated to attempt to remedy such neglect. The facts of the complaint describe those attempts and the acts of the defendants in response to his complaints of neglect of his mother.

A claim for elder abuse has not been made in this action, but elder abuse and the consequences of the Plaintiff's complaint of neglect of his mother is the context of the constitutional claims.

The family context of this action is irrelevant to consideration of the Motions to Dismiss except for the fact that it is the context

VISITATION RESTRICTIONS.

WHAT WE HAVE IS A HUNDRED ALLEGATION COMPLAINT THAT HAS A LOT OF STUFF IN THERE ABOUT DETAILS REGARDING HIS MOTHER'S CONDITION AS HE SAW IT, OR AS HE ALLEGES, DETAILS REGARDING THE ELDERLY, GENERALLY AS A CLASS.

THOSE ARE NOT RELEVANT TO THE VISITATION RESTRICTIONS, AT LEAST AS FAR AS STATING A CLAIM IN HIS COMPLAINT.

WHAT I AM CONCERNED ABOUT IS THAT THE COMPLAINT NOT ONLY IS GOING TO REQUIRE A LINE-BY-LINE ANSWER, WHICH ALBEIT REQUIRE A LOT OF DENIALS, BUT I AM CONCERNED ABOUT THE EXTENT TO WHICH THE PLEADING DOES OPERATE IN THIS CASE IS GOING TO FRAME THE ISSUES FOR DISCOVERY PURPOSES AND HOW THAT'S GOING TO PLAY OUT LATER ON IN THE CASE.

SO THAT'S WHY WE PROPOSE, WE THOUGHT IT WOULD BE THE EASIEST ON THE COURT, THAT WOULD BE THE CLEAREST, NOT REQUIRE A LOT OF BRIEFING, SO ON AND SO FORTH, TO HAVE THE PARTIES SUBMIT REDACTED COMPLAINT FOR THE COURT TO REVIEW INDEPENDENTLY AND WE JUST THOUGHT THAT WOULD BE THE MOST EXPEDITIOUS AND EASIEST WAY TO PROCEED.

THE COURT: YOU AGREE WITH THAT?

MS. FLAHERTY: YES, I DO, YOUR HONOR.

THE COURT: LET'S DO THIS.

AS MR. JENSEN POINTS OUT, WE CAN'T REALLY DO ANYTHING TODAY UNTIL WE GET THE MANDATE BACK.

Doc #344 at 25.

First, all of these statements are hearsay within the meaning of FRE 802 and Jensen has made no argument that these statements are admissible under an exception to the hearsay rule. But more importantly, this evidence actually belies Jensen's assertion, as Monstrales' letter to state defendants explicitly references Jensen's "behavioral problems" (i e, his conduct), thus negating the assertion that only Jensen's perceived mental illness was at issue in imposing the visitation restrictions.

Upon viewing all of the evidence, it is beyond dispute that state defendants' actions were based in large part (if not entirely) on Jensen's bizarre conduct towards his mother and the anxious reactions this behavior elicited from his siblings. No reasonable jury could find otherwise. Accordingly, as Jensen's perceived mental disability was not the sole basis for imposing the visitation restrictions, state defendants' motion for summary judgment on Jensen's ADA and RA claims is GRANTED.

VIII

In sum, the court DENIES Jensen's motions for reconsideration (Docs #336, 338), DENIES Jensen's Rule 56(f) application (Doc #358) and GRANTS all defendants' motions for summary judgment (Docs ##322, 329, 332).

On a side note, after fours years of litigation, massive amounts of paper and numerous hours expended by all involved, the court is of the opinion that at the heart of this complicated lawsuit is a man despondent over the state of his relationship with his immediate family. It is the court's sincere hope that these

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For the Northern District of California

differences are eventually healed or, at least, ameliorated. But it is not the job of the court to provide vengeance or leverage to siblings involved in familial disputes. The court believes that efforts to repair his tattered relationships will yield Jensen more promising results than litigation.

Accordingly, the clerk is directed to enter JUDGMENT in favor of all defendants, CLOSE the file and TERMINATE all motions.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

For the Northern District of California

severe and intractable pain and malaise and by the hopelessness of my situation. I spent three months on the mountain and during that period I substantially recuperated. I discovered while I was there that I had significant sinus inflammation that I was not aware of because it was masked by the malaise. I subsequently sought treatment for chronic sinus infection which was a significant step toward management of my malaise and pain symptoms, as is periodic antibiotic treatment.

11. I am informed and believe that on the basis of my experience and on the basis that my health problems have a genetic basis that my mother also needed periodic antibiotic treatment to control her symptoms. I am informed and believe on the foregoing bases that family attention to my health problems would have helped in understanding my mother's health problems and the health problems of other family members.

12. While on the mountain I had time to reflect on my family situation and realized that I had wasted my time and energy seeking help from my siblings and that to continue to seek help from them would be fruitless and harmful to me. I realized that I was entirely on my own in seeking to resolve and cope with my health problems. I resolved then out of necessity for my well-being to break my bonds with my siblings.

13. Because of my lack of a good relationship with my siblings, I did not reestablish personal contact with my parents until I learned the nature of my illness and its cause, and was able to manage my worst symptoms. I believed it would be dangerous for me to appear when I was too ill when there was no acceptance and understanding of my health problems.

14. I would not have become involved in the circumstances of my mother's care but for her obvious neglect, her entreaties for my company and protection, and by my sense of duty to her. Additionally, I was fearful for her because my siblings failure of empathy and understanding of my health problems and unwillingness or inability to communicate about them indicated that my mother was similarly at risk. I also became fearful for my mother after I observed that my father was left in wet diapers, and I unknowingly at the time, observed signs of his urinary tract infection that were ignored or went unobserved by his caretakers and Beth Wells, well before his infection became acute and required that my father be hospitalized.

care and reporting neglect.

Moving parties have failed to meet their summary judgment burden on both plaintiff's claims and moving parties defenses.

Moving parties' motions were effectively limited to discussing their affirmative defenses, and ignored plaintiff's dispositive evidence of the neglect of plaintiff's mother's personal and health care. Moving parties have not met the burden their threat defense imposes of showing that plaintiff's mother's personal and health care were not neglected and that plaintiff's supposedly threatening activities of investigating, observing and reporting the neglect of his mothers personal and health care were not warranted.

Plaintiff is entitled to judgment on Claims I and II.

Throughout the proceedings moving parties have prejudiced plaintiff by deliberately and improperly ignoring the relevance of plaintiff's verified allegations and evidence of the neglect of plaintiff's mother's personal and health care in a wrongful effort to influence the court to ignore them as well. All of the moving parties' facts bearing on the issues are now before the court and show that moving parties have a complete absence of proof of the essential elements of their defense. The essential elements of plaintiff's claims are undisputed The Court of Appeals has the authority to remand for entry of judgment in favor of plaintiff.

VI. ARGUMENT

A. THE CONDUCT OF THE PROCEEDINGS IN THE DISRICT COURT WAS UNFAIR AND OPPRESSIVE TO PLAINTIFF, AND CAUSED PLAINTIFF TO BE PREJUDICED AND TANGIBLY INJURED

INTRODUCTION

The VRW court opened its judgment opinion with a comment on the volume of the files, without offering an explicit opinion as to why they are so voluminous. It appears clear that the VRW court is improperly suggesting by innuendo that the volume of the files and the length of the proceedings are, by themselves, evidence that these things are plaintiff's fault. However, when the facts of the proceedings are fairly examined without resort to innuendo they show that

filed. No hearing was had on any motions related to the summary judgment.

Plaintiff filed a motion to file an oversize brief in this court which was granted in part. However, due to the page limitations plaintiff has been significantly hampered in presenting any issues beyond the VRW court's failure to consider plaintiff's evidence. The important issue of improper conduct throughout the proceedings causing prejudice to plaintiff that impacts the integrity and efficiency of the courts, and that is dealt with only indirectly in this brief due to the page limitation, should not be allowed to evade effective review.

IV. STATEMENT OF THE FACTS

1. PLAINTIFF'S MOTHER'S PERSONAL AND HEALTH CARE WERE NEGLECTED

(a) Plaintiff's mother's bronchitis related illness was neglected

Beginning in the winter of 1999, plaintiff's mother "suffered a prolonged and untreated episode of illness characterized by episodes of severe breathing distress, chronic cough, facial features darkened by a reddish flush, a haggard distressed appearance, weakness and fatigue, dizziness and vertigo, and confusion with light physical activity. The course of her illness spanned over three months, and during its course [plaintiff's mother] coughed up a large Y-shaped mucous plug then large quantities of clear then purulent mucous." SAC verified Facts ¶¶ 13-15 (E.R.Ex.A). And see E.R.95-96 (pgs.2-3 of plaintiff's verified 9/03/99 letter to Kaiser defendant Bill Jue MD). Sweet Home records show that plaintiff's mother had been coughing and had been given cough syrup and Tylenol for the period of 3/17/99 to 4/8/99. E.R.5-6.

After plaintiff's and his mother's first clinic visit to Kaiser defendant Jue to report these symptoms plaintiff's mother coughed up a large y-shaped mucous plug. After a second visit to Jue with no diagnosis or treatment, plaintiff's mother started to cough up large quantities of clear then purulent mucous. SAC verified Facts ¶¶ 15 and 26. Plaintiff then sought a second opinion from Dr. Derek Jue of Washington Newark Medical Group who diagnosed plaintiff's mother with bronchitis and prescribed her antibiotics which were never administered. SAC verified Facts ¶ 27. E.R.7-8 (record of 7/7/99 clinic visit). Plaintiff brought a sample of plaintiff's

rights to the elderly to oppress and retaliate against complainants; encourages and enables low standards of investigative inquiry by state agencies of oversight; and discourages and inhibits complainants from asserting and following through with justifiable claims of abuse, neglect, and denial of personal rights.

85. Federal law and legislative intent, and numerous federally sponsored reports and legislative hearings (see California Nursing Home Problems Persist, Sudocs NBR. GA 1.13: HEHS-98-202 & Betrayal; The Quality of Care in California, Sudocs NBR. Y 4.AG 4: S.Hrg. 105-735), and similar California law and legislative intent and state sponsored reports and hearings (see the "Little Hoover Commission" reports: Long Term Care: Compassion Without Confusion & The Snails Pace of Reforming Residential Care Facilities for the Elderly), and legal journal articles (see Butler, A Long-Term Health Care Strategy for Legal Services, 14 Clearinghouse Rev. 613 (1980)), indicate that this class is in need of special protection and that the problems of abuse, neglect, and denial of rights of this class have been refractory to legislative attempts at remedy. These listed sources have further stated that the interests of this class are under represented in the courts (see Cal. Welf. & Inst. Code §§ 15600 (h) & (j), and that supposedly competent institutions designed to protect and vindicate the rights of this class have consistently failed to do so. Exhibit B is adopted and incorporated in this paragraph by this reference in support of this allegation.

VI. CLAIM I

VIOLATION OF CONSTITUTIONAL RIGHTS, AND CONSPIRACY TO VIOLATE CONSTITUTIONAL RIGHTS UNDER COLOR OF STATE LAW, CUSTOM, USAGE, AND POLICY - 42 U.S.C. § 1983

[Defendants California Health and Human Services Agency (formerly known as California Health and Welfare Agency); California Department of Social Services, Community Care Licensing Division; Martha Lopez, Elaine Arrington, and Anita Gopaul ("State Defendants"), Sweet Home One Care Facility, Minerva Mostrales, and Soledad Almocera ("Sweet Home Defendants").

86. The jurisdictional allegations, paragraphs 1-10, the verified Facts (paragraphs 11-75), the General Claims (paragraphs 76-85), Claim II, and Exhibits A, B, and C are adopted and incorporated

AGENCY, as state entities receiving federal funds, are bound by the requirements of these Acts and by the Federal Regulations adopted to implement these Acts (42 U.S.C. §§ 12131, 12132, 29 U.S.C. § 794 and 42 U.S.C. § 6102 and 45 C.F.R. §§ 91.31 & 91.32).

IX. CLAIMS FOR RELIEF

Claims for Marguerite Jensen

111. Marguerite Jensen has no plain, speedy, or adequate remedy at law for neglect of her care and violation of her constitutional rights. The plaintiff, in his capacity as a concerned, immediate family member who has heard her complaints and observed and reported neglect of her personal and health care and denial of her rights, has been denied administrative appeal of the decisions and acts, as set forth in this complaint, of the agents of defendant COMMUNITY CARE LICENSING.

112. Wherefore, the plaintiff requests that the following relief be granted to Marquerite Jensen:

(a) That a preliminary injunction be issued voiding the "Visitation Restrictions for Tom Jensen," and prohibiting further neglect of Mrs. Jensen's personal and health care and personal rights by the defendants, and their agents, employees, or associates.

(b) That the court declare the "Visitation Restrictions for Tom Jensen" to be null and void, and a violation of Mrs. Jensen's federal constitutional rights (First and Fourteenth Amendments), and the California Code of Regulations title 22 § 87572(11).

(c) That a permanent injunction be issued against the defendants and their agents, employees, or associates, enjoining them from further violations of state law and regulations, and from

APP. 39

CERTIFICATE OF COMPLIANCE

The attached Petition for rehearing of denial of Petitioner's writ of certiorari presents substantial grounds not previously presented and is presented in good faith and not for delay.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on: Feb. 2, 2009, By: Tom Jensen

Tom Jensen,
Petitioner in propria persona,
P.O. Box 614
Oakland, CA 94604